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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1693

UNITED STATES OF AMERICA, *Petitioner,*

v.

GLEN M. CLARKE, et al., *Respondents.*

On Writ of Certiorari from the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF BERTHA MAE TABBYTITE

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REPLY BRIEF OF BERTHA MAE TABBYTITE

ARGUMENT

I

This Case Does Not Involve The Right Of Indian Allottees Or The United States To Bring Inverse Condemnation Suits

Echoing the court of appeals (see Pet. App. at 4a), Anchorage argues at some length that Indians may, at times, be benefitted by the inverse condemnation remedy and that "Indians who have been allotted lands in severalty should [not] be denied a constitutional cause of action in the nature of inverse condemnation which

is afforded to all other American citizens." Anchorage Br. 23. Anchorage concedes that Section 357 "should be construed to favor the Indian allottee" but contends that this objective is achieved "by affirming his right to a cause of action in the nature of inverse condemnation if the laws of the state in question so allow." *Id.* 27.[1]

Anchorage and the court of appeals misconceive the nature of this case as well as the position of Tabbytite and the United States. This is not a landowner's suit for just compensation. Hence, the "right" of an allottee to bring such an action either under the Constitution or otherwise is not at issue. Rather, the question presented, as stated in the Petition for a Writ of Certiorari, is whether Section 357 "authorizes a state or local government to condemn allotted Indian trust

[1] To illustrate its point, Anchorage relies on Albers v. County of Los Angeles, 62 Cal.2d 250, 398 P.2d 129 (1965), in which a landowner was awarded just compensation for damages resulting from a landslide that was unforseeably caused by the state's construction of a road on nearby land. Anchorage asserts that Indian allottees would be denied compensation in these and similar circumstances involving inadvertent takings if the government's position is upheld. Anchorage Br. 26.

The factual situation presented in *Albers* obviously is not the typical exercise of the power of eminent domain. It is certainly a far cry from the far more common direct, physical invasion of property that is here involved. It is somewhat incongruous for Anchorage to rely so heavily on inadvertent takings to justify a blatant seizure. But even assuming the correctness of its argument (but *see* note 2 *infra*), Anchorage is asking the Court to interpret the statute in a manner that favors Indians in aberrant circumstances but is contrary to the allottees' best interests in the vast preponderance of real life situations. That would be an odd and unique way of applying the canon that ambiguous statutes must be construed in the Indians' favor.

lands by physical occupation." Pet. 2.[2] The position of Tabbytite and the United States (as we understand it) is that Section 357 does not *compel* the Indian allottee or the United States to bring an inverse condemnation action *to the exclusion* of an action for ejectment and damages, and therefore state or local governments are not authorized to condemn or acquire allotted lands by seizure. Whether state or local gov-

[2] Anchorage does not explain how a construction of Section 357 that: (1) determines compensation by reference to the date of physical occupation; (2) deprives Indians of their pre-existing right to ejectment and trespass damages; and (3) permits the taking of Indian compensable property rights by governments without prior notice or an opportunity to be heard, is in their best interests. *See* Pet. 15-18; Tabbytite Br. 30-36. Its only response to the considerable administrative and other burdens imposed on Indian allottees and the United States by the lower courts' application of Section 357 is to contend that they are not matters of record. Anchorage Br. 46-47.

Anchorage's argument is predicated on two unarticulated premises: that the taking of property by physical seizure and a landowner's suit to recover just compensation are identical and inseparable, and that, under the government's theory of Section 357, the United States and the Indian allottees would be remediless when allottees' property rights are inadvertently infringed. Neither assumption withstands analysis. Section 357 can be construed to require state and local governments to initiate judicial condemnation proceedings, at least where there has been an obvious invasion of compensable property rights (*see* Tabbytite's Br. 33), while the United States and Indian allottees would still have the right to pursue the inverse condemnation remedy in unusual situations where it might be advantageous. Indeed, Section 357 could hardly be construed to deny a cause of action that is implicit in the Constitution. *See* Tabbytite Br. 33. As to the second assumption, if allotted lands cannot be taken or acquired by physical occupation, Indian allottees and the United States would retain their common law rights to restoration and/or damages, *see, e.g.*, Blake Construction Co., Inc. v. United States, 218 Ct.Cl. ——, 585 F.2d 998 (1978); and Gladin v. Von Engeln, 575 P.2d 418 (Colo. 1978), and would also be able to invoke their constitutional right (independent of Section 357) to just compensation.

ernmental trespasses may ripen into takings by the filing of inverse condemnation suits is a different question which need not be addressed.

II

Contemporaneous Usage Does Not Support Anchorage's Position

In its Brief (11-12), which Tabbytite adopted (Br. 7), the United States cites a number of decisions to show that at the turn of the century, when Section 357 was enacted, the term "condemned" was generally understood to involve a judicial proceeding initiated by the would-be condemnor. In response, Anchorage argues that contemporaneous decisions indicate that the term "condemnation" or "condemnation under judicial process" was understood to authorize acquisition of property by physical seizure. Anchorage places principal reliance on Section 7 of the 1902 Reclamation Act, 43 U.S.C. 421,[3] as construed in *United States* v. *Buffalo Pitts Co.;* 234 U.S. 228 (1913); and *State of California* v. *Rank,* 293 F.2d 340, 354-55 (9th Cir.), *affirmed* in *Dugan* v. *Rank,* 372 U.S. 609, 619 (1963). Anchorage Br. 30-34. Although there are persuasive reasons for holding that the acquisition of Indian property pursuant to Section 357 requires the initiation of a judicial condemnation proceeding even if Anchorage were correct about contemporary usage,[4]

[3] Section 7 of the 1902 Act authorizes the Secretary of the Interior to acquire property "by purchase or by condemnation under judicial process."

[4] Resorting to contemporary usage to establish legislative intent shows that Section 357 is "admittedly ambiguous" and therefore calls for application of the canon that doubtful expressions must be construed in favor of the Indians. Bryan v. Itasca County, 426 U.S. 373, 392 (1976). *See* Tabbytite Br. 11; and notes 1 and 2 *supra.*

Section 357 also involves a waiver of sovereign immunity. Minnesota v. United States, 305 U.S. 382, 388-89 (1939). Construing the statute as imposing on the United States the considerable burden of expense of discovering all "takings" by physical seizure on millions of acres of scattered Indian allotments goes well beyond the far more limited waiver found in *Minnesota, supra.* Therefore, in keeping with the principle that a waiver of sovereign immunity "cannot be implied but must be unequivocally expressed," United States v. King, 395 U.S. 1, 4 (1969), Section 357 should be construed so as to place the onus of initiating legal action on the condemnor rather than the United States.

close analysis of Anchorage's authorities shows that the United States has the better of the argument.

Buffalo Pitts did not involve the taking of property by physical seizure or the exercise of the power of eminent domain. In carrying out its responsibilities under the Reclamation Act, the United States took an assignment of an engine that was being used by a government contractor. The issue in the case was whether the United States had assumed an obligation to pay the chattel mortgage on the engine after the contractor defaulted on his debt and the government took possession. The right of the United States to take possession of the engine under its contract was not in dispute. 234 U.S. at 233-34 and 235. The mortagee sued for compensation, not for possession. When compensation is sought, the fact and the legitimacy of the taking are conceded. *Great Falls Manufacturing Co.* v. *Garland,* 124 U.S. 581 (1888).[5]

[5] The other cases cited by Anchorage are not even near the mark. In Shoemaker v. United States, 147 U.S. 282 (1893), the statute whose constitutionality was challenged (on grounds unrelated to inverse condemnation) expressly provided that the court "may direct the time and manner in which the possession

It is true that *Buffalo Pitts* was cited by the court of appeals in *State of California* v. *Rank, supra,* 293 F.2d at 355, for the proposition that the United States is authorized by Section 7 of the Reclamation Act to effect a taking by physical seizure. But that was only part of its reasoning; the court of appeals also relied on the "less restrictive language" in a subsequent 1937 statute which authorized the acquisition of property "by proceedings in eminent domain, or otherwise." 293 F.2d at 355. Significantly however, in affirming the court of appeals this Court made no mention of *Buffalo Pitts* and relied solely on the "less restrictive" 1937 statute. *Dugan* v. *Rank, supra,* 372 U.S. at 619.[6]

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of the property condemned shall be taken or delivered, and may, if necessary, enforce any order or issue any process for giving possession." 147 U.S. at 285-86. Thus, by its very terms that Act proscribed takings by seizure. Great Falls Manufacturing Co. v. Garland, 124 U.S. 581 (1888), held that by suing for compensation in the Court of Claims, the plaintiff had assented to the taking of his property and had waived its right to object to the loss of possession. 124 U.S. at 597-600. By contrast, the authorities cited by the United States (Br. 11-12) involve ejectment actions or suits to compel the initiation of condemnation actions. It is only in the ejectment context that the authority of the potential condemnor to occupy the property is drawn into question.

[6] There is an indication that this Court disapproved the reasoning of the court of appeals predicated on *Buffalo Pitts* and the 1902 Reclamation Act. This Court stated (372 U.S. at 619, with emphasis added):

> The Court of Appeals correctly held that the United States was empowered to acquire the water rights of respondents by physical seizure. *As early as 1937*, by the Rivers and Harbors Act, 50 Stat. 844, 850, the Congress had provided that the Secretary of the Interior "may acquire by proceedings in eminent domain, or otherwise, all lands, rights-of-way, water rights, and other property necessary for said purposes . . . .

The words "[a]s early as 1937," imply that the government was not empowered to accomplish a taking by physical seizure by the language of the 1920 Act.

Dugan v. *Rank, supra,* therefore at least implicitly supports the government's position that a turn of the century statute authorizing only condemnation does not permit takings by physical seizure.

III

Whether Acquisition Of Highway Rights Of Way Across Allotted Indian Lands Requires The Approval Of The Secretary Of The Interior Should Be Considered And Resolved In This Case

Anchorage has joined issue with Tabbytite regarding the relationship between Section 357 and the statutes, Sections 311 and 323 *et seq.*, that authorize the Secretary of the Interior to grant highway rights of way across allotted Indian lands. Tabbytite argues (Br. 9-29) that Sections 311 and 323 *et seq.* are the exclusive means of obtaining such rights of way, while Anchorage contends (Br. 48-61) that condemnation or seizure pursuant to Section 357 provides an alternative mechanism for acquiring the same interests.

Anchorage specifically notes its agreement with Tabbytite's argument (Br. 14-17) that prior administrative practice and construction are not of much assistance in resolving this issue of statutory construction. Anchorage Br. 51. This is significant because *United States* v. *Minnesota,* 113 F.2d 770 (8th Cir. 1940), the leading case holding that rights of way across allotted lands can be acquired through condemnation as well as by secretarial grant,[7] is expressly predicated on what Anchorage acknowledges is an er-

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[7] Subsequent lower decisions uncritically follow *Minnesota. See, e.g.,* Nicodemus v. Washington Power Co., 264 F.2d 614, 618 (9th Cir. 1959); United States v. Oklahoma Gas & Electric Co., 127 F.2d 349, 354 (10th Cir. 1942), *affirmed on other grounds,* 318 U.S. 206 (1943).

roneous view of prior administrative practice. *See* 113 F.2d at 773-74; and Tabbytite Br. 17-18 n.9. This makes it all the more necessary for this Court to resolve the issue left open in *Minnesota* v. *United States,* 305 U.S. 382, 391 (1939).[8]

Although the general rule is that this Court will not consider issues that were not raised before the lower courts, it is not inflexibly applied. *Youakim* v. *Miller,* 425 U.S. 231, 234 (1976). In recent years this Court has decided several important and recurring questions of public concern to which no exceptions were taken, which, unlike the situation here, were not fairly encompassed within the Petition for Certiorari, and which were not presented or briefed by the parties either in this Court or the lower courts. *See, e.g., Connor* v. *Finch,* 431 U.S. 407, 421 n.19 (1977); *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.,* 429 U.S. 363, 368 n.3 (1977); *Fry* v. *United States,* 421 U.S. 542, 545 n.5 (1975); *Schlesinger* v. *Councilman,* 420 U.S. 738, 743-44 (1975); *Blonder-Tongue Laboratories* v. *University Foundation,* 402 U.S. 313, 319-20 and n.6 (1971); *Allen* v. *State Board of Elections,* 393 U.S. 544, 554 (1969); and *United States* v. *Western P. R. Co.,* 352 U.S. 59, 63 (1956).

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[8] Although Anchorage responds to Tabbytite's statutory argument in considerable detail, it does not address her contention that Sections 311, 323 *et seq.* and 357 should be construed in a manner that effectuates the current congressional policies manifested in the 1934 Indian Reorganization Act, 25 U.S.C. 461 *et seq.*, and the 1948 Indian Right of Way Act, 25 U.S.C. 323 *et seq.* rather than the turn of the century allotment policies which have now been repudiated. Tabbytite Br. 24-29. *See also* the Indian Self-Determination Act of 1974, 25 U.S.C. 450 and 450a; and the Act of September 17, 1976, 90 Stat. 1275.

One of the principal reasons for the general presumption against deciding issues that were not raised below is to insure that this Court exercises its appellate jurisdiction only after the issues have been fully briefed as well as refined and analyzed by lower courts. *See Usery* v. *Turner Elkhorn Mining Co.,* 428 U.S. 1, 37 (1976); *Estelle* v. *Williams,* 425 U.S. 501, 508 n.3 (1976); and *United States* v. *Atkinson,* 297 U.S. 157, 159 (1936). These considerations are satisfied here. The lower courts have been heard from and the issue has been fully briefed.

Other factors that have been cited by this Court also counsel in favor of resolving the issue here and now. This case arose in the federal courts, *Blonder-Tongue, supra,* and the question is one of federal law which this Court left open 40 years ago. There are no disputed facts. *Allen, supra.* Tabbytite's argument would almost certainly have been rejected by the lower courts in view of the existing Ninth Circuit precedent. Tabbytite Br. at 29-30. For this reason alone, this "case is at most only marginally subject to the rule that this Court will not consider issues 'not pressed or passed upon below.'" *Youakim, supra,* 425 U.S. at 235. Deciding the issue now will promote the interests of judicial economy. Tabbytite Br. 30; *Allen, supra.* Consideration of the statutory issue may obviate the need to decide a constitutional question. Tabbytite's Brief 36-37; *Fry, supra.* It is also jurisdictional because if Tabbytite is correct, the district court would lack jurisdiction to condemn the right of way even if a judicial proceeding is initiated. *Compare Schlesinger, supra.* And like the issue decided in *Western P. R. Co., supra,* this case also involves the maintenance of a proper relationship between the courts and an admin-

istrative agency in a matter of continuing concern to the general public as well as to Indian allottees.[9]

IV

Injunctive Relief Is Appropriate

Anchorage argues (Br. 20-22) that injunctive relief is not appropriate because a taking by seizure has occurred and the United States and Tabbytite have an adequate remedy at law, an inverse condemnation suit to recover just compensation. Principal reliance is placed in *Hurley* v. *Kincaid,* 285 U.S. 95 (1932).

Insofar as Anchorage's argument assumes that a valid taking has occurred under Section 357, it begs the crucial question.[10] Tabbytite and the United States

[9] If this Court decides that highway rights of way across allotted lands cannot be obtained pursuant to Section 357, it should then consider whether that decision should be given only prospective effect. If the decision were applied retroactively, highway rights of way obtained by condemnation pursuant to Section 357 could be declared trespasses. The factors to be considered are clearly spelled out in Chevron Oil Co. v. Huson, 404 U.S. 97, 106-107 (1971). Applying these criteria, Tabbytite submits that a decision upholding her statutory argument should not be applied retroactively. Of course, the new rule would apply to this controversy since neither Anchorage nor any of its predecessors has obtained a condemnation judgment pursuant to Section 357 and they have continuously been on notice of this suit and of Tabbytite's objections to the road across her land. Pet. App. 12a-13a and 15a.

Quite apart from the retroactivity issue, a condemnation judgment awarding a right of way across allotted lands in which the United States appeared in behalf of the allottee would be entitled to res judicata effect. Durfee v. Duke, 375 U.S. 106 (1963); Heckman v. United States, 224 U.S. 413 (1912).

[10] Anchorage's argument on this point presupposes that highway rights of way can be acquired by judicial condemnation pursuant to Section 357. Anchorage apparently recognizes that an injunction would be proper if, as Tabbytite contends, secretarial approval of the right of way is required.

contend that Anchorage's occupation of Tabbytite's allotment is illegal and unauthorized and that her property has not been taken.

Insofar as Anchorage suggests that injunctive relief should be denied even if the seizure of Tabbytite's land is illegal, its contention is contrary to a long and consistent line of precedents. *See, e.g., United States* v. *Lee,* 106 U.S. 196 (1882); *Hooe* v. *United States,* 218 U.S. 322, 335-36 (1910); *Lane* v. *Pueblo of Santa Rosa,* 249 U.S. 110 (1919); *United States* v. *North American Transportation & Trading Co.,* 253 U.S. 330, 333 (1920); *United States* v. *Goltra,* 312 U.S. 203, 208 (1941); *Youngstown Sheet and Tube Co.* v. *Sawyer,* 343 U.S. 579, 584-85 (1952); and *Dugan* v. *Rank,* 372 U.S. 609, 619-23 (1963).[11]

[11] *Hurley* is also distinguishable on its facts. The taking, if any, that was involved was inadvertent and only incidental to the government's project. The government acted in the good faith belief that protected property rights had not been infringed. 285 U.S. at 102-103. The plaintiff complained only about the failure to pay just compensation in advance of the alleged taking (285 U.S. at 104); hence there was no consideration of procedural due process concerns. And in cases arising under Section 357, the lands to be condemned are not private grants. Allotments are set apart "for a recognized public purpose,—that of safeguarding and advancing a dependent Indian people dwelling within the United States." Alaska Pacific Fisheries v. United States, 248 U.S. 78, 88 (1918). *Accord:* United States v. Rickert, 188 U.S. 432, 437 (1903). Thus, in contrast to *Hurley,* takings of allotted Indian lands always involve competing public uses and conflicting public policies. While permitting the seizure of allotted lands without prior notice or compensation definitely interferes with national Indian policies, requiring would-be condemnors to initiate judicial proceedings in obvious taking situations simply enforces minimum procedural due process safeguards. Tabbytite Br. 31-33.

In circumstances like those involved in *Hurley* and Dugan v. Rank, *supra,* large government projects could be stopped in their tracks if possible inadvertent infringements of compensable prop-

On this point, this case is analogous to *Dugan* v. *Rank, supra*. There, an injunction was refused on the grounds that the appropriate remedy was a suit for just compensation but only after it was determined that government officials were authorized to take private property by physical seizure. If seizure had not been authorized, the invasion of the plaintiffs' water rights would have been enjoined as an unauthorized trespass rather than as a partial taking. 372 U.S. at 620-23. *See also Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 695 and 701-02 (1949); *Santa Fe P. R. Co.* v. *Fall*, 259 U.S. 197, 199 (1922); and *Payne* v. *Central P. R. Co.*, 255 U.S. 228, 238 (1921).

In accordance with the procedure followed in *Dugan*, the Court must first determine whether takings of allotted Indian lands by physical seizure are authorized by Section 357. If the position of Tabbytite and the United States is upheld, the individuals and entities responsible for the seizure of Tabbytite's property would be acting in violation of the supreme law of the land. In such circumstances, injunctive relief is entirely appropriate. *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 193-95 (1978); *Dugan* v. *Rank, supra*. Indeed, refusing to issue an injunction after finding (or assuming) that physical seizures are not authorized by Section 357 would validate unlawful conduct and permit the acquisition of Indian property rights without the requisite federal consent, *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 667-71 (1974); 25

erty rights gave rise to injunctive relief. In this case, it is the government's administration of twelve million acres of allotted Indian lands that would be made much more difficult if flagrant physical seizures are sanctioned. Brief for United States 16-23.

U.S.C. 177, and without observance of procedures required by law. *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Smith* v. *McCullough*, 270 U.S. 456, 463-65 (1926); *Bunch* v. *Cole*, 263 U.S. 250 (1923).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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